

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

September 20, 2011

Timothy G. Willard, Esquire
Fuqua, Yori and Willard, P.A.
28 The Circle, P.O. Box 250
Georgetown, DE 19947

Richard E. Berl, Jr., Esquire
Assistant County Attorney
Smith Feinberg McCartney & Berl, LLP
406 South Bedford Street
P.O. Bo 588
Georgetown, DE 19947

Umbert V. Pomilio, III
874 Port Penn Road
Middletown, DE 19709

**RE: John Yost and Catherine Yost v. The Board of Adjustment of Sussex
County and Umbert V. Pomilio, III
C.A. No. S11A-01-007-ESB**

Date Submitted: June 15, 2011

Dear Counsel and Mr. Pomilio:

This is my decision on John and Catherine Yosts' appeal of the Sussex County Board of Adjustment's decision granting a five foot variance to Umbert V. Pomilio, III, so that he can move his cottage five feet into the 15 foot side-yard setback for Lot 9 on Bay Shore Drive in Broadkill Beach, Delaware. Pomilio's 30 x 24 foot cottage is currently located on Lots 9 and 10. He wants to move his cottage so that it will be entirely on Lot 9. Lot 9 is a corner lot that measures 50 feet x 100 feet, has 50 feet of road frontage on Bay Shore Drive, and backs up to the Delaware Bay. It has a 15 foot side-yard setback instead of the normal 10 foot side-yard setback because it is a corner lot. The larger setback for corner lots is apparently designed to improve a driver's visibility as the driver goes around

the corner. Pomilio wants to keep the long side of his cottage facing the Delaware Bay in order to preserve his water view. In order to do this he has to move his cottage five feet into the 15 foot side-yard setback. Pomilio submitted an application to the Board for a five foot variance from the 15 foot side-yard setback. Lot 9 is located between Lot 10 and a “paper road” that is only used by pedestrians to get to the beach. The Yosts’ cottage is on the other side of Bayshore Drive across from Pomilio’s cottage. Their cottage faces Lots 8 and 9 and the pedestrian access road. The Yosts now have a largely unobstructed view over Lot 9 of the Delaware Bay.

Pomilio needs to move his cottage off of Lot 10 as part of a settlement of litigation with the Yosts over an estate. The litigation involved Lots 9 and 10, each of which had a cottage on them as part of a family compound. The cottages were connected to each other by a large deck. Pomilio wants to move his cottage off of both lots and solely onto Lot 9. He plans to essentially “slide” the cottage from its current location. Without the variance, the cottage will not fit onto Lot 9 as it is currently configured. In order to make the cottage fit onto Lot 9 and comply with the side-yard setback, Pomilio would have to rotate the cottage so the long side of the cottage faces the pedestrian access road instead of Bayshore Drive. He will also have to make some modifications to his cottage so that he would still have a water view. This would presumably involve placing some windows on the end of the cottage facing the Delaware Bay.

The Yosts objected to Pomilio’s application for a variance because it would impair their view of the Delaware Bay. They argue that Pomilio does not qualify for a variance because he can move his cottage onto Lot 9 without violating any of the setback requirements if he rotates the cottage from its current position so that the long side of the

cottage faces the pedestrian access road instead of Bayshore Drive.

The Board approved Pomilio's application for a variance, finding that Lot 9 is unique because of its size, increased side-yard setback requirement, and the need to move the cottage onto Lot 9 to settle litigation involving an estate, that Pomilio would incur significant expense to rotate his cottage around to comply with the side-yard setback requirement, that Pomilio did not create the need for the variance, that the variance will not change the essential character of the community, and that the variance requested is the minimum necessary.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of a Board of Adjustment is limited to whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.³ It merely determines if the evidence is legally adequate to support the agency's factual

¹ *Janaman v. New Castle County Board Of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976); *aff'd* 379 A.2d 1118 (Del. 1977); *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. Super. 1960).

² *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

findings.⁴ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁵

DISCUSSION

In order for the Board to grant a variance it must find that the five factors set forth in 9 *Del.C.* § 6917(3) have been established by substantial evidence. For area variances the courts have interpreted how these factors, in particular the exceptional practical difficulty standard, should be applied. In *Board of Adjustment v. Kwik-Check Realty, Inc.*,⁶ the Supreme Court held that:

“[T]he Board should take into consideration the nature of the zone in which the property lies, the character of the immediate vicinity and the uses contained therein, whether, if the restriction upon the applicant’s property were removed, such removal would seriously affect such neighboring property and uses; whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvement in the character of that use of the property which is a permitted use under the use provisions of the ordinance.”

The five factors set forth in Section 6917(3) are as follows:

a. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship or exceptional practical difficulty is due to such conditions, and not to circumstances or conditions generally created by the provisions of the zoning ordinance or code in the neighborhood or district in which the property is located;

b. That because of such physical circumstances or conditions, there

⁴ 29 *Del.C.* § 10142(d).

⁵ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

⁶ 389 A.2d 1289, 1291(Del. 1978).

is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance or code and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

c. That such unnecessary hardship or exceptional practical difficulty has not been created by the appellant;

d. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

e. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.⁷

1. Unique Physical Circumstances or Conditions Particular to Lot 9

The Board found that Lot 9 is unique because of its size, increased side-yard setback requirement, and the need to move Pomilio's cottage onto it in order to settle litigation over an estate. Lot 9 measures 50 x 100 feet, has a 15 foot side-yard setback along a "paper road," and covers 5,000 square feet. The Board noted that the minimum lot size in the applicable zoning district is 10,000 square feet with 10 foot side-yard setbacks. Based upon this, the Board concluded that Lot 9 is undersized and legally nonconforming. This conclusion is correct, but it ignores the fact that Lot 9 is the same size as all of other lots in Broadkill Beach and has the same 15 foot side-yard setback that every other corner lot has in Broadkill Beach. Thus, there is nothing unique about the size or side-yard setback requirements for Lot 9 relative to other corner lots in Broadkill Beach. Put another way, if Lot 9 is just like all of the other corner lots in Broadkill Beach, then there is hardly anything unique about it. The Board's finding that Lot 9 is unique because

⁷ 9 *Del.C.* § 6917(3).

Pomilio needs to move his cottage onto it in order to settle litigation over an estate has nothing at all to do with whether or not Lot 9 is unique. Instead, it has everything to do with the litigation. The litigation involves dividing up ownership interests in Lots 9 and 10. While the litigation itself and the settlement of it are certainly interesting, they do not make Lot 9 unique in any particular way. There are simply no physical circumstances or conditions particular to Lot 9 that make it any more or less unique than the other corner lots in Broadkill Beach. The Board's finding that Lot 9 possesses unique physical circumstances or conditions is not supported by substantial evidence in the record.

2. The Variance Must Be Necessary to Enable The Reasonable Use of Lot 9

The Board found that the variance was necessary to allow Pomilio the reasonable use of Lot 9, reasoning that without the variance Pomilio would have to turn the cottage and modify it at significant expense in order to comply with the side-yard setback requirement. Presumably, the Board concluded that without the variance Polimio would suffer an unnecessary hardship or exceptional practical difficulty in making normal improvements to Lot 9. Again, the Board erred in reaching its conclusions. There is simply no evidence to support the Board's finding that the variance is necessary for Pomilio to reasonably use Lot 9. Pomilio readily admits that his cottage will fit on Lot 9 within the existing side-yard setback without a variance. He simply has to rotate the cottage when he moves it. Pomilio does not want to do this because it would require him to modify the cottage so that he would still have a water view. As the Board noted in its decision, the law does not protect a property owner's view. As to Pomilio's testimony that he would have to remodel his cottage at significant expense, there is nothing in the record to support this. He did not describe what he has to do or how much it would cost. Pomilio already has to

incur the expense of moving his cottage from Lots 9 and 10 to Lot 9. Moreover, the reality is that Pomilio's remodeling costs are all related to preserving his water view and unrelated to modifying the cottage to make it actually fit on Lot 9. The Board's finding that Pomilio needs the variance to reasonably use Lot 9 is not supported by substantial evidence in the record.

3. The Difficulty Must Not Have Been Created by the Applicant

The Board found that the unnecessary hardship or exceptional practical difficulty was not created by Pomilio. According to the Board, the hardship or difficulty was created by the prior co-ownership of the cottages on Lots 9 and 10 and the need to separate these ownership interests and to move one of the cottages. This explains why Pomilio needs to move his cottage off of Lot 10, but it has nothing to do with why he wants a variance. Pomilio has, as I have already noted, readily admitted that he can place his cottage on Lot 9 in accordance with the side-yard set back requirement. He would not have to modify his cottage at all to do this. It is only to keep his water view that Pomilio would have to modify his cottage by placing some windows at the end of the cottage facing the Delaware Bay. There is no evidence in the record of what this would cost. Quite simply, Pomilio applied for a variance because he wants to put an existing cottage of a certain size on Lot 9 in a certain manner to keep his water view. Thus, the need for the variance has everything to do with Pomilio's preferences for a water view and his desire to save money and nothing at all with the physical uniqueness of Lot 9. While this is understandable, it does not mean that the need for the variance is in any way related to some physical circumstance or condition unique to Lot 9. The Board's finding that Pomilio did not create the need for the variance is not supported by substantial evidence in the record.

4. The Variance does not Alter the Essential Character of the Neighborhood

The Board found that granting the variance will not alter the essential character of the neighborhood because it would only partially affect the Yosts' waterfront view. Given that the impact on the Yost's view is minimal and that the "paper road" is used by pedestrians going to the beach and does not need to be maintained for the benefit of motor vehicles, the Board's finding in this regard is supported by substantial evidence in the record.

5. The Variance is the Minimum Necessary

The Board found that the requested variance was the minimum necessary to afford relief to Pomilio. Having concluded that Pomilio does not need and has not met the requirements for a variance, it logically follows that there is no minimum variance necessary. Thus, the Board's finding that a five foot variance is the minimum necessary is not supported by substantial evidence in the record.

CONCLUSION

The Board's findings on four of the five factors set forth in § 6917(3) are not supported by substantial evidence in the record. The evidence in the record establishes that there is nothing at all unique about Lot 9 because it is the same size and has the same side-yard setback as every other corner lot in Broadkill Beach, that Pomilio can move his cottage on to Lot 9 in compliance with the side-yard setback requirement without any difficulty or hardship, that the only expense that Pomilio would have to incur by complying with the side-yard set back requirement relates to putting windows on the end of his cottage facing the Delaware Bay in order to protect his view, an interest that the Board

found is not protected under the law, that there was no evidence about how much this would cost, that Pomilio created the need for the variance by wanting to put an existing cottage of a certain size on Lot 9 in a certain manner simply to preserve his water view, and that there is no minimum variance needed. Given this, the Board of Adjustment's decision granting the variance must be and is **REVERSED**.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

cc: Prothonotary's Office